UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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JEANETTE ALLEYNE, et al.,

Plaintiffs,

-versus- 06-CV-994

(ORAL ARGUMENT)

NEW YORK STATE EDUCATION DEPARTMENT, et al.,

Defendants.

- -

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on TUESDAY, JULY 21, 2009, before the HON. GARY L. SHARPE, United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFFS:
O'CONNELL & ARONOWITZ
BY: JEFFREY J. SHERRIN, ESQ.

ECKERT, SEAMANS LAW FIRM
BY: MICHAEL P. FLAMMIA, ESQ. and CHARLOTTE BEDNAR, ESQ.

MEREDITH H. SAVITT, ESQ.

FOR THE DEFENDANTS:
HON. ANDREW M. CUOMO, New York State Attorney General
BY: KELLY L. MUNKWITZ, Assistant Attorney General

(Court commenced at 1:02 PM.)

THE CLERK: The date is Tuesday, July 21, 2009, at 1:00 PM. In the matter of Jeanette Alleyne, et al., versus the New York State Education Department, et al., case number 06-CV-994. We are here for a motion hearing. Could we have appearances for the record, please?

MS. MUNKWITZ: Kelly Munkwitz from the Attorney General's office for the defendants.

THE COURT: Good afternoon.

MS. MUNKWITZ: Good afternoon, your Honor.

MR. FLAMMIA: Michael Flammia for the plaintiffs, your Honor.

THE COURT: Good afternoon.

MS. SAVITT: Meredith Savitt for the plaintiffs.

THE COURT: Good afternoon.

MR. SHERRIN: Jeffrey Sherrin, O'Connell & Aronowitz, for the plaintiffs.

THE COURT: Good afternoon.

MR. SHERRIN: How are you, Judge?

THE COURT: I'm good. We are here with what I'll refer to as the State defendants' motion for summary judgment. They seek summary judgment on all claims filed by the plaintiffs or, alternatively, to dissolve the preliminary injunction. There are no cross-motions pending before the Court by the plaintiffs at this time.

In summary, the claims that remain are federal statutory claims -- IDEA, FAPE, free appropriate public education claim -- in Count 1; there's referenced what I refer to as a global IDEA claim in claim 6; and a Rehabilitation Act claim in claim 3. And then, generically, there are federal and state constitutional claims. There's a substantive due process claim, which is claim 2; a procedural due process claim, claim 5; and equal protection claim, claim 4.

It's a fair characterization to say that the surviving issues in these claims generally encompass IDEA claims and nonIDEA claims. It's clear that as to the nonIDEA claims, they're governed by the normal summary judgment standard, which I have shared with the parties as a Court Exhibit and which I now incorporate into the record of these proceedings. It's also clear that as to the IDEA claims, the State has filed its motion under that traditional summary judgment standard, not that which often applies to IDEA claims.

Let me share with the parties that alternative IDEA standard which is not incorporated in the exhibit, which is, essentially, as follows: Generally, when a party moves for summary judgment in an IDEA claim, the normal inquiry as to whether there are any issues of fact or credibility does not apply. That's New Paltz Central School

District, 307 Fed Supp 2d 394, 2004, Northern District opinion. Instead, the inquiry is whether the administrative record, together with any additional evidence, establishes that there has been compliance with the IDEA. The District Court must engage in an independent review of the administrative record and make a determination based on a preponderance of the evidence. That's Gagliardo, Second Circuit's opinion at 489 F.3d 105.

Here, however, a full record of adjudicative proceedings at the administrative level has not been provided. Plaintiffs have not cross-moved for summary judgment, and both parties argue the defendants' motion under the normal Rule 56 standard. The Court may apply a normal summary judgment standard to IDEA claims if the parties so elect. That's Doe, 133 F.3d 384, Sixth Circuit, 1998. However, it's unclear here exactly how the parties expect this action to proceed if summary judgment is denied, in part or in whole, or what will be gained through a trial.

As I've already indicated, as to the nonIDEA claims, the Court addresses the defendants' motion under the normal summary judgment standard which I have supplied in the Court Exhibit. What I propose to do here this afternoon is go through a number of the issues that are before me, probably in a give and take exchange back and forth. As opposed to hearing from the State in toto on its motion and

the plaintiffs in opposition to that motion, I would prefer to do it piecemeal, so if you can follow me, I would be happy to hear from ya, I will issue an order and we will see where this leads us. I intend to dispose of as much of the motion as I feel I can based upon the review I have given the motion papers before assuming the bench this afternoon. As to those I do not feel I can rule on, I will reserve and render an opinion accordingly.

Let's take up an easy one, the issue of mootness. As the State points out, summary judgment on the claims of 13 student plaintiffs who no longer attend JRC or receive aversives are now moot. The plaintiffs do not oppose. Thus, as to these 13 students, they no longer have any personal stake in the litigation, there's no reasonable expectation that they will require aversives and their claims are dismissed. That's Spencer v. Kemma, 523 US 1, Supreme Court's 1998 decision. So the record is clear, the Court discerns from its review of the papers that those student plaintiffs are as follows: DB-2, NB, CC, KD, AD, TE, SF, CJ, PP, MP, ES, CS, and JT.

Let me turn then to various issues that have been raised by the State as they may impact one or another of these claims and begin with the State's exhaustion claim. It is the State's position in its summary judgment motion that all remaining claims must be dismissed because the

plaintiffs failed to exhaust. The initial questions I have for the State in this regard have to do with whether exhaustion is, in fact, required on the state of this record. And the first question is where the claims are aimed at wrongdoing, it's inherent in the program, namely inherent in the regulations themselves, don't the plaintiffs challenge the regulations as having denied them a FAPE and isn't that an exception to the exhaustion requirement?

MS. MUNKWITZ: Your Honor, the plaintiffs have individual claims and the plaintiffs have, as the Court pointed out, global claims. And to the extent there's a global claim that challenges the regulations themselves, then no, I do not take the position that exhaustion is necessary. And that is addressed in a separate part of my brief, the global claim.

But to the extent the complaint can be construed to be individual claims, that these individual plaintiffs were denied a FAPE, then yes, exhaustion is required, for a couple of reasons. As the Court pointed out, generally, in IDEA cases, there is a different standard. We don't have that standard here, that standard is not available to me because there is no administrative record on any of these students. The question as to whether to take, for example, GR, whether GR was denied a FAPE needs to be decided at the administrative level.

Now, there is no federal right to aversives. There is no requirement that children undergo pain in order to be educated. There's no federal mandate to that. What there is a federal mandate for is a free appropriate public education.

THE COURT: Haven't these particular students, the remaining individual plaintiffs in the case, in light of my mootness ruling, aren't they authorized aversives in their IEP?

MS. MUNKWITZ: The IEPs that were in place at the time that this motion -- or action was started, some of them were, some of them weren't. And we went through. It's a fluid thing. Some of these students are getting aversives, some of them aren't. But there has been a finding at the administrative level that aversives are necessary to the students' achievement of FAPE. The students are -- whether there's alternatives to aversives, and again, it's aversives to three categories, not in total, each of these students will be entitled to aversives for destructive or for self-injurious and aggressive behavior. The question is are they denied FAPE for being denied aversives for those lesser categories, and there's no administrative finding to that. There's been no administrative hearings. Actually, I take that back. There have been administrative hearings, but they have not been incorporated into this lawsuit. Some of

these plaintiffs are out there challenging the CSEs. There are a number of CSEs who are now recommending against aversives. But this lawsuit is being used to keep the aversives in place. So the --

THE COURT: But add to those students that are authorized aversives, meaning the plaintiffs in this case, those who remain who are authorized aversives, are they required to exhaust when there's a regulation in place that would preclude the use of aversives?

MS. MUNKWITZ: Yes, your Honor. And, again, because the federal right is not to aversives. The federal right is to FAPE. And those CSEs have not made the determination that FAPE cannot be achieved in the absence of aversives.

THE COURT: But they've already ruled they're entitled to aversives as part of their IEP, haven't they?

MS. MUNKWITZ: They put aversives on the IEP at JRC's bidding. JRC tells the students --

THE COURT: I don't care who's bidding. The point is there is an IEP in place that authorizes aversives that would be outlawed by this regulation, aren't there?

MS. MUNKWITZ: Some of them, there are.

THE COURT: And therefore, are they required to exhaust before they bring this lawsuit or is that an exception? That's what I'm pointing to. Is it an exception

to the exhaustion requirement?

MS. MUNKWITZ: I do not believe it's an exception to the exhaustion because one of the purposes of the exhaustion requirement is to provide the Federal Court with an administrative record. We don't have an administrative record here. By not letting them -- or not mandating that they exhaust, they have to come to Federal Court and have a Federal Court say, in the first instance, what is and is not FAPE, and the Federal Court sees fit not to do that. The Federal Government defers to the State to determine the standards that make up FAPE for each individual student and that is by bagging the requirement and usurping the State's authority to dictate what those standards are. So, absent a finding from an administrative -- absent an administrative record for this Court to look at, there's really no ability for this Court to determine FAPE as intended by the IDEA.

THE COURT: Do the State hearing officers, presuming an administrative process in which you have findings from State hearing officers, do they have any authority to overturn the regulations that have been passed here?

MS. MUNKWITZ: They do not, your Honor. But what they have is is the opportunity -- they bring in teachers, they bring in psychologists probably in this case. They make a record of where the student -- how the student is

doing, what the student needs, what the student is getting, how the student has progressed. They would take a look at that three-month period of time when the regulations were in effect and they would look at that and say is there a requirement here that this student have aversives in order to achieve FAPE? They would have that administrative record. Now, at the end of the day, can students get aversives under the regulations? Yes. Can students get aversives under the regulations for the full range of behaviors? No. But whether that violates the right to FAPE is something that needs to be determined administratively so this Court has an adequate record.

THE COURT: Thank you. Is there anything that the plaintiffs want to add to the state of the record insofar as the exhaustion issue is concerned? I have read and digested the plaintiffs' position in that regard and I understand what you've written, but I want to provide you with the opportunity to say anything for purposes of this record that you care to that's in addition to or different than what you've already said.

MR. FLAMMIA: Your Honor, I would just be repeating our brief, which is that it's the CSE, the Committee on Special Education that decides, in the first instance, what this child needs to get a FAPE, and in the case of these children, it was decided that they needed

aversives in all five of the categories of behaviors: Aggressive, self-injurious, dangerous, obstructive, destructive. And it was NYSED that pulled out some of those aversives and we quoted some of the IHO decisions where the IHO officer said I would like to put the aversives back in, but I cannot because of the new regulations. So, there is an element -- it clearly falls under the exception of the exhaustive administrative remedies on futility because there's nothing a parent could accomplish in administrative process to put those aversives back in because it would violate a regulation. IHO officers have said this kid is hurting, education is hurting because the aversives were taken out by the NYSED and I can't do anything about it. In fact, it referenced this case and said it's currently being decided by a Federal Court. There is futility. It does apply generally to a policy, the regulations that we feel violate the law, which is another exception, and it's also a violation of the IDEA, and services in the IEP are not being provided and prohibited from being provided.

So, for all those reasons, Judge, we say exhaustion does not apply.

THE COURT: I'm prepared to rule on the exhaustion issue, and I do so as follows: As I've said, the defendants contend that all claims in the complaint must be dismissed for failure to exhaust administrative remedies, with the

exception, I point out, of the plaintiffs' sixth claim, which alleges that the regulations are inconsistent with the IDEA. As the defendants recognize in their papers, the claim falls within the systemic exception to the exhaustion requirement set forth in Coleman, 503 Fed 3d 198, the Second Circuit's 2007 decision. Administrative remedies for purported violations of the IDEA consist of mediation or an impartial hearing before an independent officer or appeal to a State review officer. That's the Education Law in New York, 44O4(1)(a) and 2.

Generally, a party seeking judicial review under the IDEA must have first resorted to these channels or else the Court is deprived of jurisdiction. That's the Second Circuit's decision in Handberry, 446 F.3d 335. Failure to exhaust administrative remedies also bars nonIDEA claims where the relief sought under those claims is available under the IDEA. That's the Circuit's decision in Cave, 514 F.3d at 240. However, exhaustion is not required where the plaintiff demonstrates, one, an agency has failed to provide services specified in the child's individualized educational program, IEP; an agency has abridged or denied a handicapped child's procedural rights, for example, failure to implement required procedures concerning least restrictive environment or convening of meetings; three, an agency has adopted a policy or pursued a practice of general applicability that

is contrary to the law; four, where it would be otherwise futile to use the due process procedures, for example, where the hearing officer lacks the authority to grant the relief sought; or, five, an emergency situation exists. The Court cites as its authority for the proposition the Congressional Record, 131 Cong.Rec. 21392-93, 1985. The House Report, Number 296 of the 99th Congress, First Session, 7, 1985. The Supreme Court's decision in Honig, 484 US 305; the Second Circuit's decisions in Taylor, 313 F.3d 768; and Heldman, 962 Fed 2d 148.

Here, the plaintiffs did not pursue administrative remedies prior to commencing this action. Those facts are conceded. Nonetheless, they clearly satisfy a number of exceptions to the exhaustion requirement. First, their claims are aimed at wrongdoing that is inherent in the program itself as the regulations themselves are challenged as having resulted in the denial of a FAPE. That's JS, 386 F.3d 107, Second Circuit, 2004. The Court also cites King, 918 Fed Supp 772, a Southern District, 1996 decision.

Furthermore, the agency has failed to provide services specified in the student plaintiffs' IEP as the regulations have resulted in the deprivation of aversive interventions set forth in those individual programs. Heldman, 962 Fed 2d at 159, n.11.

Finally, it would be futile to require plaintiffs

to pursue their administrative remedies. As they point out in their papers and argue here, administrative hearing officers have no authority to overturn regulations or establish State educational policy. Again, I cite Heldman at 159. As such, the Court declines to dismiss the plaintiffs' IDEA claims and the other claims for failure to exhaust administrative remedies and, instead, turns to the merits of those claims.

The Court also points out on the exhaustion issue, it rejects defendants' contention that a CSE must determine aversives are necessary to a FAPE before the exceptions to exhaustion may be relied upon. Requiring a CSE or administrative finding of the denial of a FAPE before permitting an exception to the exhaustion requirement would make any such exception useless. In any event, the CSEs' approval of JRC's proposed IEPs with aversives included indicates that the CSEs did feel aversives were necessary to a FAPE, despite the defendants' characterization of this approval as a mere rubber stamp. Furthermore, numerous IHOs have reinstated aversives to student plaintiffs' IEPs since the Court's preliminary injunction went into effect. Defendants' contention that the plaintiffs must prove the regulations deny them a FAPE before they may rely on the futility exception to exhaustion appears to the Court to put the cart before the horse.

Let me turn to the IDEA claims. As a general matter, the State defendants argue that the IDEA claims must be dismissed because the emergency regulations are consistent with the IDEA and did not deprive the student plaintiffs of a FAPE. That's the general summary of the argument. There are two main components to the argument. The first is that the student progress reports indicate that they made, quote, academic, closed quote, progress, while the regulations were in place. And two, the regulations represent an informed educational policy choice between two conflicting schools of thought about the use of aversives which is entitled to deference by this Court.

It appears to me, given my review of the papers, that as to the first aspect of that argument, namely the student progress reports indicate they made academic progress, the State appears to rest its argument on the view that behavioral progress is irrelevant to a FAPE. Am I right?

MS. MUNKWITZ: No, your Honor. Behavioral progress can be relevant to FAPE, but it is not, in and of itself, make a FAPE. And there's several cases cited in my brief where children had emotional issues and the emotional issues were not being dealt with in the way the parent wanted, but the child was making academic progress. And at the end of the day, the IDEA is in place to open the door

for education and if the student is getting an education, he or she may have other issues, may have medical issues, may have behavioral issues, may have issues with other disabilities, but as long as they are making progress academically, the IDEA does not put the -- does not require services. Related services have to be read together with education. Related services to achieve educational benefit. And if the students are achieving educational benefit, then the related services are satisfactory.

THE COURT: Let me just ferret out what you're tellin' me to make sure I absolutely understood it. I thought your citation in your papers to the Circuit's JD opinion, which interpreted the Vermont regulations, was designed to suggest that -- and I am just gonna parrot what you just told me and then you tell me if I'm wrong in parroting it incorrectly, because I want to make sure what the State's position is here, 'cause I know what mine is. And my question is do we have a bone of contention here or don't we.

Are ya telling me that if you look at any one of these plaintiffs and you fairly evaluate their academic progress, whatever that means, to "fairly evaluate," and I know you're gonna get differing views depending on who you ask, but I suppose since the litigation is pending before me, ultimately that's a question for me, but let's presume

that I find that the record reflects that a plaintiff has made academic progress, but I also find that there is ample evidence that there has been behavioral regression. Is it the State's position that then the behavioral regression is irrelevant to a FAPE as long as the record demonstrates academic progress?

MS. MUNKWITZ: Not irrelevant, your Honor, but it's not controlling. The controlling question under the IDEA is the educational progress. And the IDEA is not in place to ensure that students with psychological problems or emotional problems -- it's not in place to provide those students with care solely for that psychological problem. It is in place to ensure that that student's disability does not get in the way of his education. And in order for the IDEA to be triggered, there needs to be the education component. Related services can't be read -- it can't be read in its own right. By the statute's wording, it's related services to benefit education.

So, no, it is not irrelevant, your Honor, but I do not believe that it is at all controlling. What controls is the academic progress.

THE COURT: But aren't we mincing words there? Maybe not, I don't know. I still don't know what you just told me. It's circuitous logic. Let me try it one different way.

If the record clearly demonstrates behavioral regression, can that constitute the basis for the denial of a FAPE, in the State's view?

MS. MUNKWITZ: In the absence of academic regression, no.

THE COURT: All right. So, then, the inverse of that, which is the way I think I parsed it the first time, is that if there's academic progress, then behavioral regression cannot constitute the denial of a FAPE in the State's view?

MS. MUNKWITZ: Correct.

THE COURT: And what's your authority for that?

MS. MUNKWITZ: I've cited a couple of cases, I believe, in the reply brief. One of them being JD versus Pawlet School District, 224 F.3d 60.

THE COURT: Wasn't the Circuit, in JD, interpreting Vermont regulations that said as much? The Vermont regulations said that paramount was the academic progress and behavioral aspects had no play in the educational component. Those were the regulations that were before the Circuit in JD, were they not?

MS. MUNKWITZ: They were, your Honor.

THE COURT: And those regulations are now defunct, Vermont has rescinded them.

MS. MUNKWITZ: Okay. I didn't hear that, your

Honor.

THE COURT: I am not askin' ya to accede to a proposition you're not at all certain of. But let me take you back to New York State. Does New York State have any such regulation in place that supports your view of what the FAPE requires? Does New York say, in any regulation you can point me to, that behavioral aspects of an education are irrelevant to a FAPE?

MS. MUNKWITZ: No, your Honor. But what the -- what New York says and what the IDEA says is supportive services -- the term "related services" means transportation and such developmental, corrective and other supportive services as may be required to assist a child with a disability to benefit from a special education. And it boils down to benefitting from a special education. There are cases out there where students -- blind student wants a specific accommodation, but she's able to perform in the classroom, she doesn't get that accommodation. Even though it would help her, even though it would benefit her, what we look at at the end of the day is is the child academically performing. And in each of these cases, the plaintiffs are academically performing.

THE COURT: Of course, we are talking about disabilities and behaviors that are different than eyesight. We are talking about stabbing other people in the eye, we

are talking about substantial difficulties in one or more of these students, are we not?

MS. MUNKWITZ: There is one child who -- I haven't seen anything demonstrating it in the record, but there was one child who, apparently, in another school, stabbed a child with a pencil. There are isolated instances of violence and, your Honor, these regulations will not affect that aspect of those children's education or those children's psychological services. When these children engage in aggressive behavior, they will have that opportunity.

THE COURT: I am not arguing it from that standpoint, what the regulations permit or what they don't. What I'm looking at are what are the components of a FAPE, free appropriate public education, under the IDEA. I know your view is, as you've just articulated it, that the IDEA looks to academic progress, and I'm suggesting perhaps it looks to two issues: Academic progress and behavioral performance. That may be a part of a free appropriate public education, so I am just taking a contrary view.

MS. MUNKWITZ: I don't dispute that it can be a component, your Honor. I fully accept the fact that behavioral problems absolutely can be relevant to the question of FAPE. But the determination as to whether a FAPE is warranted, according to the IDEA, needs to be

determined by the State educational authority and, in this case, the State educational authority is New York State Education Department. And New York State Education Department, like many other education departments in this country, have determined that pain is not needed to educate a child and these are standards that the IDEA provides New York State with the authority to determine.

THE COURT: I don't want to be obtuse and too nuance on this issue, and I don't want to jump ahead of myself either in the way I want to progress to the issues raised in the motion, but you are at the heart of something I discern from an overall perspective in terms of the State's motion. Those are two separate, discrete issues, in my mind, that you just pointed to. In other words, if you look at the standard the Court is to apply in the normal IDEA context, that that's the standard I read, it's different than the summary judgment motion standard incorporated in the Court Exhibit. There's no question, in my mind, that an issue that needs resolution is who defines FAPE, what delegation of authority has been afforded the states by Congress in the IDEA and what overall impact that has on the question before us, which is the use of aversives. That's one issue.

But I'm raising a more nuance issue, and that's this: That in resolving that issue, which is the

penultimate issue in this case, has been since the first conference I sat down with everybody and talked about getting it before me in six months. How idiotic I was.

MS. MUNKWITZ: So long ago, I don't remember, your Honor.

THE COURT: Thank you, I appreciate your graciousness in that regard. You could have said you were stupid, Judge, and I would have accepted the admonition. While that's the penultimate issue, to me, your papers are spread with the notion that in evaluating that, all I'm authorized to look at is academic progress. It's -- I'm not sure I see it that way, nor am I certain, like I said, other than the Circuit's JD decision, which interpreted, in my view, Vermont regulations that are now defunct, there are clearly other circuits that have interpreted the IDEA to say that a free appropriate public education has at least two components: Academic progress and behavioral aspects of a child's education, in my view.

I don't remember what you told me. Do you agree that New York State has no regulation that says behavioral progress is irrelevant to a FAPE?

MS. MUNKWITZ: No, I don't, your Honor.

THE COURT: You do not agree with that?

MS. MUNKWITZ: I am not aware of any New York State regulation that says that it is irrelevant.

THE COURT: Okay.

MS. MUNKWITZ: I accept the fact that it is relevant but, again, it's not the controlling. Academic progress would be the controlling issue, the controlling inquiry.

THE COURT: All right. Thank you. What do the plaintiffs want to tell me about this issue, beyond, again, anything you've already told me? I want to give you the opportunity to respond to what you're hearing here and add anything you care to to the record.

MR. FLAMMIA: Your Honor, very briefly. This argument is another example why these regulations are illegal and so harmful to students. They treat students as a group, as opposed to looking at their individual needs which is an absolute requirement of the IDEA, black letter law. You want to know when a child needs for FAPE. You look at the IEP and you will see, in many cases, particularly in the case of our clients at JRC, you will see a spectrum of services. Education, behavioral, physical therapy, speech therapy, and it is the combination of all of those things, based upon an individual analysis of what that child needs, to get access to education, that is the FAPE and that is the law.

And it's not as the defense has clearly argued in their brief that behavioral doesn't matter, it's all about

grades, and that just isn't the case for these severely disabled individuals. There are goals in these IEPs and it's just as important for the special education of a child as to how they do with math, English or spelling. You only get your FAPE if you get access to all of those services and if you take out any one of those services, for instance, if these regulations outlawed physical therapy, we'd have the same problem we have here today. It's needed to get access to education. If you have someone like we do with one of the representative plaintiffs here that punched her eyes so many times she caused herself to become blind, that has to be dealt with. Or if someone is ripping apart a classroom, you have to deal with that behavior, and it opens the door to special education.

Thank you, your Honor.

THE COURT: Well, as I've already suggested, the resolution of this is almost a sub issue. In other words, my resolution of the dispute about what constitutes the components of a FAPE, while important to me and important to the penultimate issue here, is not going to resolve any of these claims. But that's not gonna prevent me from taking the opportunity now as opposed to having to write on it later as to how I view this issue about the components of what constitutes a FAPE and, therefore, I offer the parties the following:

In essence, the defendants assert that each of the representative student plaintiffs' progress reports indicate academic progress was made while the regulations were in force at JRC. They contend that the regulations represent an informed educational policy choice between two conflicting schools of thought on the use of aversives and that such choice is entitled to deference from the Court. That's the second component of what I started with, but I'm focused on the first component.

The main problem with the defendants' argument is that they assert behavioral progress is not -- I don't want to say irrelevant, which is the way I wrote it, but I'm not sure how to characterize it. I will simply leave the State's characterization as it is, that it's not as critical to a FAPE as the educational component. It's the Court's view that this argument is advanced in order to trivialize the student plaintiffs' marked behavioral regression when off aversives. As I've already suggested, the primary Circuit case supporting the defendants' proposition applies now defunct Vermont regulations, which are obviously inapplicable here. As I said, that's the Circuits' JD decision, at 224 F.3d 60. Contrary to JD, other Circuits interpreting other States' regulations have indicated that behavioral interventions are a part of FAPE. See, for example, Mr. I, 480 F.3d 1, First Circuit, 2007, stating the

IDEA entitles qualifying children to services that target all of their special needs, whether they be academic, physical, emotional or social. Alex R, 375 F.3d 603, the Second Circuit's decision. An IEP that fails to address disability-related actions of violence and disruption in the classroom is not reasonably calculated to enable that child to receive educational benefits. Weixel, 287 F.3d 138, a Second Circuit, 2002 decision. The scope of IDEA's concerns is not limited to students with learning disabilities, but instead applies broadly to students who need special education and related services.

Additionally, both the United States and the New York Education Departments have opined that academic achievement is not the sole measure of an emotionally disturbed student's qualification for special education and related services. See Application of a Student Suspected of Having a Disability, Appeal Number 08-100 at 17-18, which is available at 188 PLI/NY 349. See also Letter to Clarke, 48 IDELR 77, March 8, 2007, which is available at www.ed.gov/policy/speced/guid/idea/letters/2007, for the sake of brevity, et seq. As such, the Court does not adopt what it perceives to be the defendants' contention that the regulations do not deny the student plaintiffs a FAPE regardless of their behavioral regression. In other words, the Court sees the issue of what constitutes a FAPE as a

joinder of those two issues. Again, I decline, at this point, to rule on the penultimate question, however, for which that is a component but I do next want to turn to the Rehabilitation Act claim. Again, progressing as I can to dispose of those issues that I can.

The State argues that Section 504 of the Rehabilitation Act does not permit personal capacity suits as, therefore, the Rehabilitation Act claim must be dismissed as against Commissioner Mills. I have read the papers, read the complaint, I have read all of those things and I am led to ask the burning question: Does the complaint allege a personal capacity suit against Mr. Mills?

MR. FLAMMIA: It does not, your Honor.

THE COURT: That takes care of that issue. In other words, to the extent one might read it as such, the plaintiffs have resolved the issue that it does not. In any event, I would dismiss it if it did.

Let me then turn to the plaintiffs on the Rehabilitation Act claim and pose some questions to the plaintiffs in this regard. I will leave Miss Munkwitz alone for a bit and turn to this side.

MS. MUNKWITZ: I appreciate that, Judge.

THE COURT: My questions are this: I think you concede, given my review of the papers, that in order to maintain a Rehabilitation Act claim, you have to demonstrate

something more than simply the denial of a FAPE. You have to demonstrate bad faith, which I think you recognize because I think your arguments in that regard are that the State accepted allegations of mistreatment by JRC as a fact, in 2006, without conducting an investigation. But then you do say they did conduct an investigation, but the plaintiffs were unhappy with the investigation that was conducted and didn't have the requisite experts in place to conduct that investigation, et cetera, et cetera. I am paraphrasing your paper response.

But my question is: You concede, do you not, that a Rehabilitation Act claim requires more than just the denial of a FAPE? If all we had were the denial of a FAPE, that wouldn't constitute a claim under the Rehabilitation Act, would it?

MR. FLAMMIA: Yes, your Honor, that is correct. And I would focus the Court's attention on gross misjudgment. It is one of the severest acts of government gross misconduct to ban a treatment or restrict it so much that it's not effective without ever having looked at the individual needs of the people that are receiving it. You could ban chemotherapy, you could ban physical -- anything, and say you're being reasonable if you close your eyes to the only group of people that need it.

The people -- I talked about student SS, who is a

representative plaintiff, who punched herself in the eye so many times she made herself blind. There was nothing New York could do for her until she went to JRC and was on aversives, nothing.

Another representative plaintiff student, JR; she came to JRC from New York on so much antipsychotic medication that the JRC psychologist had to take her to a cardiologist because her levels were so high she was at risk for a heart attack at any moment. Seven-year-old girl. That's the only solution that New York has to treat this level of severe behavioral disorders.

Now, those two young girls are doing fantastic right now, Judge. They're -- it took a long time, particularly with JR, who was on that level of antipsychotic medication, and I would see this, your Honor, when I would visit the school, long before I knew any of this would happen. They would walk her around, her eyes closed, a little seven-year-old girl on so much medication they could barely -- they had to hold her up. It is the ultimate act of gross misjudgment to ban a treatment, or restrict a treatment without ever looking at the people that depend on this, and see why they're on it, why they need it. They never looked at it. The individual needs of these kids were never studied. The parents were never talked to, clinicians never talked to.

The things government can do and has done over the course of history by turning a blind eye to a group of people, a small, fragile, unprotected group of people, should never be condoned, and your Honor, I believe is exactly the kind of claim that at least deserves a trial under the Rehabilitation Act.

Thank you, your Honor.

THE COURT: What would the State like to add to the record of these proceedings?

MS. MUNKWITZ: Just that it's certainly an impassioned plea on behalf of the children. Mr. Flammia doesn't cite to any authority that requires State agencies to speak to any and all individuals who would be affected by this. For example, right now the FDA is considering banning the use of acetaminophen with other products. There's probably millions of people in this country who rely on those products every day for severe pain. I know of no requirement and it would be just impossible for the FDA to speak to those people prior to implementing any regulation, so I would just say that absent some authority that requires State governments to speak to individuals before they act, there is no gross misjudgment here.

MR. FLAMMIA: Your Honor, if I may be heard. In that case, there was at least some evidence someone was harmed by the drug. In this case, there's none. The

officials were asked, in deposition, "Did you ever find any harm from the use of these aversives"? "No, none."

Thank you, your Honor.

THE COURT: I understand the competing arguments here and I don't resolve the Rehabilitation Act. In other words, I decline to do that. But I'm happy to have the parties ascension to the fact that it does require something different than the denial of FAPE. And I understand the issue that has to be decided in that regard and I decline to rule on the dimensions of the claim further, in light of the arguments of the parties.

Let me just point out, it's clear -- let me throw this out, for what it's worth. The Court clearly understands the divergent opinion in the country about the use of aversives. I don't think the plaintiffs would contest that point. While I agree that I understand the importance of the opinion to the plaintiffs in this case, the use of aversives is not an uncontroversial topic certainly.

Let me turn to the constitutional claims. The State argues in it's motion that the claims are barred by sovereign immunity and that the claims, in any event, have no merit, so there's a substantive argument as to each of the constitutional claims, but then there are some overall arguments to the claims in general. So, let me begin with

the sovereign immunity claims.

And let me ask the plaintiffs: Isn't it clear that sovereign immunity bars State constitutional claims against State employees in their official capacity, regardless of the relief that's sought in those claims? How do the plaintiffs respond to that?

MR. FLAMMIA: In their official capacity, your Honor?

THE COURT: Right.

MR. FLAMMIA: Well, we would simply argue that to the extent they're acting on behalf of the State in imposing, condoning illegal conduct that's affecting the plaintiffs, certainly that's how the State acts and those are the people whose actions are the subject of our claims.

THE COURT: And aren't they entitled to sovereign immunity under governing law? In other words, you're precluded from suing on State constitutional claims.

MR. FLAMMIA: On State constitutional claims.

THE COURT: Right.

MR. FLAMMIA: Yes, your Honor.

THE COURT: Let me ask ya again in that regard, I see a repartee there in the motion and the response as to how we characterize your federal claims, but there is no vehicle to bring federal constitutional claims, is there, other than 1983?

MR. FLAMMIA: Your Honor, I believe we cited the cases in our brief that direct actions under the constitution are recognizable, that, you know, there's limits maybe to what you -- you can't get monetary damages certainly, but conduct by a State official that's violative of the federal constitution is subject to redress in this court.

THE COURT: Naturally, the State recognizes, doesn't it, that as to this issue of sovereign immunity, it would not bar suit against Mills in his official capacity to the extent plaintiffs seek prospective injunctive and declaratory relief. It would bar suit against the State Education Department and the other defendant. Does the State recognize that?

MS. MUNKWITZ: Yes, your Honor.

THE COURT: All right. All right. The plaintiffs, on the substantive due process claim, argue that the right to a public education is fundamental and, therefore, strict scrutiny is applied to the regulations that are at issue here. This is in their substantive due process claim. Isn't the law exactly the opposite, that while public education is a right, it's not a fundamental right that would subject the regulations to strict scrutiny? Hasn't the Supreme Court and this Circuit ruled that public education is not a fundamental right?

MR. FLAMMIA: Your Honor, our argument is that if these regulations are allowed to stay in place, then most of these plaintiffs are gonna be back on drugs, and there is a liberty interest involved in being forced onto drugs. Now, you could say, well, they're not being forced. But they're children, they can't consent. And this is an unusual circumstance, your Honor, where we believe we can prove in trial that if they lose the right to these aversives, they will be back on massive dosages of antipsychotic medication. There is argument there that NYSED says something about treatment that causes pain. Can you imagine the pain of a child punching her eye until she's blind or the pain that medication causes to poison, to rot their insides away? I can't think of a greater liberty interest in this case and I can't think of a more needy group of individuals than these children not to be forced to do this. And that's exactly what's gonna happen; they will be on drugs, lots of 'em.

THE COURT: But that's not the essence of this lawsuit. This lawsuit has to do with whether the State is authorized to pass the regulations under the IDEA. And the ramifications of that, as you've just described them, while cogent, poignant, something I well understand, as I've said to the parties all along in this litigation, it's that very issue that caused me to issue the preliminary injunction in the first place, to protect at least these named plaintiffs

until this litigation was resolved in a legal manner, those are all beyond the scope of what you sued for here. Those are not the fundamental rights or the fundamental property interests that are at the heart of your complaint. They aren't even in your complaint.

What's in your complaint is the denial of a free appropriate public education. And if I were to find the State -- to go back to the penultimate issue -- is tasked with the responsibility of determining the parameters of that, in terms of the use of aversives, then that is the death knell of any substantive due process claim and, more than likely, procedural due process claim, and I'm not sure what the basis of the equal protection claim is in the first place. And if those claims go out -- there is a reason I started where I did and I might as well take it up at this point. The way in which this issue has been posed to me by motion for summary judgment, where I'm not being called upon to evaluate that penultimate issue, under the standard that poses that question in a routine way under the IDEA, in other words where a Court is called upon to make that decision, so with that in mind, let me play "what if" with the parties, and you'll understand why I asked the question I did at the outset.

As is clear at this juncture, certain issues are going to -- certain issues are gone at this point, I ruled

on 'em. Certain issues are certainly giving you a flavor of how I feel about 'em. But if -- when, at the end of the day, all is said and done, if the constitutional claims are gone and the only claims that are left are those that are under the IDEA, is there a jury trial in this case? What's the next step in this process? In other words, what more am I gonna have? An evidentiary hearing? Am I gonna have -- are you even entitled to a jury trial, if the only claims that survive are those as to whether or not these student plaintiffs have been denied a FAPE? Do you get a jury trial on that?

MR. FLAMMIA: Your Honor, we haven't asked for one.

THE COURT: Do you get any kind of trial on that?

MR. FLAMMIA: Well, we would agree, your Honor, that the facts are so overwhelming in terms of the denial of FAPE and the violation of the IDEA by eliminating a form of treatment that's accepted in the peer review journals, even NYSED's own expert thinks aversives are necessary. Yeah, we believe the evidence is so overwhelming that these regulations cannot be allowed to stand in the face of the IDEA.

THE COURT: What more would you submit to me in some subsequent proceeding beyond what you've already submitted? Deposition transcripts? Affidavits, expert

opinions, et cetera, et cetera? What else is there that you would submit in support of your argument that the students here were denied a FAPE that you've not already submitted?

MR. FLAMMIA: Well, your Honor, we have certainly given your Honor substantial evidence. You know, 40 pages, you can't fit it all in. Your Honor could hear from these parents, could sit next to you and tell your Honor the story of their child and how New York left them with nothing, in a psychiatric hospital, getting no education, drooling all over themselves, massively overweight from medication, getting absolutely no education, and then how they placed their child at JRC and how the aversives completely changed their child's lives from a life of nothing to a life of everything, hope and potential, and give your Honor more of the records from these treatment facilities, the Anderson School, one of the best schools and does great work, no doubt about it, and Malmar (phonetic) and other reports that say we can't help this kid, he needs aversives, needs structure. There is a great deal of other evidence of similar things we have already given your Honor. And more of it is about these experts that were used by the defendants to perpetrate this scheme to stop aversives. How little they know about aversives, how little they understand, how little they did when they came to JRC. All the things they didn't look at. There's a mountain of

evidence, your Honor, about what was done here, how it was done and how it was done to these children. And that's what we would present to you.

MS. MUNKWITZ: Your Honor, may I be heard on that?

THE COURT: You may, but just a second. Is it your position, then, even if the constitutional claims should survive that you have waived a jury trial here?

MR. FLAMMIA: Yes. We have not asked for a jury trial.

THE COURT: I could not remember whether a jury trial was demanded.

MR. FLAMMIA: It was not, your Honor.

THE COURT: So everybody has decided to leave this totally in the Second Circuit and the Supreme Court. Please, be heard.

MS. MUNKWITZ: Your Honor, on the summary judgment motion, a nonmovant has the obligation to come forward to bear the proof. And anything that the plaintiffs had to support their claim should be before this Court right now. Mr. Flammia talks about the experts that came out. That's -- has nothing to do with this case, has to do with whether these students are achieving FAPE and has nothing to do with the State's authority to implement these regulations to begin with. If there is evidence before this Court that these students are being denied a FAPE, or if the plaintiffs

have evidence that these plaintiffs have been denied FAPE, it should be before your Honor right now. Summary judgment is to dispose of these claims and not maybe we will have more evidence afterwards.

THE COURT: It is. But also let me say where the clock ticks one way, it ticks the other as well.

MS. MUNKWITZ: I understand.

THE COURT: The State is also limited to the arguments it's made, having elected to proceed by the summary judgment standard and having argued that the only thing relevant to a FAPE is academic progress. The minute I rule against the State on that issue, I deny their summary judgment motion, and then it comes right back to the question I ask: Where does that leave us?

MS. MUNKWITZ: I understand, your Honor.

THE COURT: If this case is gonna survive in some fashion post-decision by me, then what then do I do? That's what I'm asking the parties. What do you say? Mr. Flammia says that perhaps he would produce a student for an evidentiary hearing. I'm not gonna hold anybody to this, because you did not come here anticipating this was a question I was gonna ask ya.

MS. MUNKWITZ: No.

THE COURT: I'm throwing this out so that it will give you an opportunity to think about it and discuss it

with the clients once these proceedings are over.

MS. MUNKWITZ: I appreciate that, your Honor.

THE COURT: But what's your knee-jerk view on that issue? If something remains here because I deny, at least in part, the motion for summary judgment, then what comes next? What do you think comes next?

MS. MUNKWITZ: Your Honor, I actually asked myself that question this morning, I asked myself that question --

THE COURT: You were hoping nothing comes next.

MS. MUNKWITZ: -- on my way down here, and that's what I did, I put the eggs in that basket and said I can't go any further. Your Honor, there would also need to be additional discovery in this matter because the only -- our discovery was limited to ten plaintiffs, so I have -- the State has not had the opportunity to depose any of these parents and I think five of the plaintiffs are no longer -- or four of the plaintiffs, the ones we chose, are no longer at JRC or are not under the age of 21. If we go forward, the defendants are at a disadvantage with respect to we don't have -- we haven't had access to the records of any of these children, we have had no discovery based on those children whatsoever, the other 35.

THE COURT: Um-hum. Well, maybe, maybe not. I am not asking the parties to finally resolve that issue, in any event. I have simply thrown it out for your consideration,

'cause I thought about it.

What else would either party want to share with me about the motion that's pending that I have not discussed at this juncture? Let me say in that regard as to the issues I have not raised or ruled on, it is my intention to issue a written decision. To the extent I have already resolved some issues, I will incorporate a summary of those in that decision. In other words, the docket and record of these proceedings will suffice in that regard. That's what my intention is. I suppose once I have done that, I will have narrowed the issues for the parties, at least with some degree of a decision, and that will facilitate a discussion at that point as to what comes next, frankly, which is something for you to digest and think about. And I am not resolving this. I steadfastly said I wasn't gonna resolve the penultimate question here, but, in my view, that penultimate question is: Who has the authority to define the breadth and scope of a FAPE, and what deference do I need to give to he or it that has that authority? There is a fundamental disagreement here between the parties in this regard. It is the plaintiffs' view that absent some consideration of individuals, the Court cannot resolve what constitutes a FAPE or doesn't. It is the defendants' view that they have been delegated the authority under the IDEA and Congress to at least, in part, define what constitutes a

FAPE and what doesn't. And then, of course, you have the issue of aversives that play into that view.

Ultimately, I am gonna have to rule on that one way or another and I have every intention of doin' that and then we'll move on from there. I've covered what I want to cover. What more would any of you like to cover, or have you had enough?

MR. FLAMMIA: I would just like to add one thing, your Honor, on the issue of FAPE. Obviously, we argue that it is not completely up to the State to decide FAPE, and if it were, we wouldn't have a federal law. State immunity and everything your Honor is talking about today, to say -- take the position that it's completely up to the State as to what a FAPE is, the IDEA disappears, and that's not what Congress intended.

THE COURT: Right. And I spoke too broadly in that regard, Mr. Flammia. That's the danger of me sittin' up here mouthing off. You can take the words I said and construe 'em more broadly than I intended, and I did not intend to suggest that Congress had no role here. There is no question that Congress itself has said that each disabled child in this arena is entitled to a free appropriate public education. And while Congress has offered some guidance as to what constitutes a free appropriate public education, and as various courts around the country have weighed in on that

issue as to, quote, unquote, what Congress obviously have intended, as judges avoid best they can policy determinations in that regard, where this ultimately flows down to is not that Congress doesn't maintain the ultimate control, they do. The question is how much of that definition have they delegated? How does that delegation or that ultimate definition come into play when you funnel it down through and come to the issues of aversives? Does a State, employing whatever authority they have under the IDEA, have the right to regulate aversives? That's really the issue here. And ultimately, it is the penultimate question that I must resolve. That's a different way of sayin' what I intended to say before, but I did not mean to suggest that Congress had retained no play in that and that it's incumbent upon me, as the interpreter of what Congress intended, to do the best I can with that issue.

Anything further?

MR. FLAMMIA: Certainly, it's with NYSED's authority to change the regs. I mean, you look at some of the decisions of these IHO officers saying please, help me, I've got this kid who's regressing, you know, this regulation isn't working.

THE COURT: Hope springs eternal, but... That's all I can do is shake my head. Anything further you would like to add?

MS. MUNKWITZ: Nothing further, your Honor. Thank you.

THE COURT: Thank you.

(This matter adjourned at 2:14 PM.)

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C E R T I F I C A T I O N

I, THERESA J. CASAL, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

_____

THERESA J. CASAL, RPR, CRR

USDC Court Reporter - NDNY

DATED:

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY